Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-63–09 OF 2012(W)
ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, AHMAD MAAROP AND ZAINUN ALI FCJJ
17 OCTOBER 2013

Civil Procedure — Appeal — Interference by appellate court — Whether Court of Appeal ('COA') wrong to have set aside High Court's finding of facts without showing where trail judge had erred — Whether COA not in position to controvert High Court's evaluation of evidence and reasons for its findings — Whether COA erred in reversing trial judge's decision to disallow amendment to pleadings after parties had closed their case — Whether rejection of amendment correct in circumstances of case and based on established principles of law

The appellant sued the respondent in the High Court for the cost of variation works it had carried out under a subcontract between the parties and for the return of monies under a performance bond it had provided and which the respondent had encashed. The respondent, in turn, counterclaimed for damages for alleged delay in completion of the works and for the cost of rectifying defective works. In granting judgment to the appellant, the High Court rejected a late application by the respondent, made in its written submissions at the end of the trial, to amend its counterclaim. The Court of Appeal ('COA') set aside the whole of the High Court's decision and also allowed the amendment to the counterclaim. No order was made that the matter be retried by the High Court nor was any order made on the counterclaim. After filing its application for leave to appeal to the Federal Court, the appellant discovered that the COA's grounds of judgment stated that a retrial of the action had in fact been ordered. On formally seeking clarification on the issue, the COA's coram which had heard the appeal clarified that no retrial was ordered; that the court had merely set aside the decision of the High Court and that the grounds of judgment would be rectified accordingly. The appellant contended in the instant appeal that the COA erred in setting aside the High Court's decision without showing what error the trial judge had committed in coming to her decision. It also said the COA was wrong to have allowed the amendment to the counterclaim after the parties had closed their respective cases and that if the COA felt the amendment should have been allowed by the trial judge, then it should have remitted the case back to the High Court for retrial.

Held, allowing the appeal with costs:

(1) There was no cause for the COA to have set aside the decision of the High

Court in the circumstances of the case. The COA could only do so in a case of this nature if the trial judge was plainly wrong in coming to her decision. The case before the High Court involved findings of facts. Unless the trial judge was plainly wrong, it was not open to the COA to have intervened even to the limited extent of ordering a retrial (see para 10).

(2) A close analysis of the trial judge's grounds of judgment showed the judge did consider the issue of the variation works, the various items of the counterclaim, the items of alleged defective works and the issue of the performance bond. None of these matters was dealt with or addressed by the COA in its grounds of judgment (see paras 12–14).

(3) As the trial judge had gone through all evidence both oral and documentary and had given reasons for her findings which the COA was not in a position to controvert, the COA was wrong to have exercised its powers of appellate interference, more so in the present case when the COA was found to be uncertain in its grounds of judgment on whether it had ordered a retrial of the case or not. Clearly, in revising the decision of the High Court the COA had not correctly applied the principle of appellate intervention (see para 15).

(4) The COA was wrong to have reversed the trial judge's decision to disallow the amendment to the counterclaim. The trial judge did consider the issue in sufficient depth and made the correct decision to refuse the amendment. She was mindful of the fact the amendment was sought late in the day — and that too without a formal application but raised in the respondent's written submission — after all witnesses had been called to testify and the parties had closed their case. Her decision on the issue was correctly supported by a number of case authorities on settled principles of amendment of pleadings. Even if the trial judge was wrong to have refused the amendment the COA ought then to have proceeded to consider the appeal on its merits with the benefit of the amendment but, that, it did not do (see paras 16–18).

[Bahasa Malaysia summary

Perayu telah menyaman responden di Mahkamah Tinggi untuk kos kerja-kerja pengubahan yang telah dijalankan di bawah subkontrak antara pihak-pihak dan untuk pulangan wang di bawah bon pelaksanaan yang telah disediakan dan yang mana telah ditunaikan oleh responden. Responden, seterusnya, telah menuntut balas ganti rugi untuk kelewatan yang dikatakan dalam menyiapkan kerja-kerja tersebut dan untuk kos kerja-kerja memperbaiki yang rosak. Dalam memberikan penghakiman kepada perayu, Mahkamah Tinggi menolak permohonan lewat oleh responden, yang dibuat dalan penghujahan bertulis di akhir perbicaraan, untuk meminda tuntutan balasnya. Mahkamah Rayuan ('MR') telah mengetepikan keseluruhan keputusan Mahkamah Tinggi dan

juga membenarkan pindaan kepada tuntutan balas itu. Tiada perintah dibuat bahawa perkara itu perlu dibicarakan semula oleh Mahkamah Tinggi mahupun terdapat apa-apa perintah yang dibuat berkenaan tuntutan balas itu. Selepas memfailkan permohonannya untuk kebenaran membuat rayuan ke Mahkamah Persekutuan, perayu mendapati bahawa alasan-alasan penghakiman MR menyatakan bahawa perbicaraan semula berhubung tindakan itu sebenarnya telah diperintahkan. Berhubung memohon penjelasan secara rasmi tentang isu itu, korum MR yang telah mendengar rayuan itu menjelaskan bahawa tiada perbicaraan semula telah diperintahkan; bahawa mahkamah tersebut hanya mengetepikan keputusan Mahkamah Tinggi dan bahawa alasan-alasan penghakiman diperbetulkan sewajarnya. Perayu menegaskan dalam rayuan ini bahawa MR terkhilaf dalam mengetepikan keputusan Mahkamah Tinggi tanpa menunjukkan kesilapan yang telah dilakukan oleh hakim perbicaraan dalam membuat keputusan beliau. Ia juga mengatakan MR terkhilaf kerana membenarkan pindaan kepada tuntutan balas selepas pihak-pihak telah menutup kes-kes masing-masing dan bahawa jika MR merasakan pindaan patut dibenarkan oleh hakim perbicaraan, maka ia patut meremitkan kes itu balik kepada Mahkamah Tinggi untuk perbicaraan semula.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tiada sebab untuk MR mengetepikan keputusan Mahkamah Tinggi dalam keadaan kes ini. MR hanya boleh berbuat demikian dalam kes yang bersifat sedemikian jika hakim perbicaraan jelas terkhilaf dalam membuat keputusan beliau. Kes di hadapan Mahkamah Tinggi melibatkan penemuan fakta. Kecuali jika hakim perbicaraan jelas terkhilaf, ia tidak terbuka untuk MR masuk campur meskipun setakat memerintahkan perbicaraan semula (lihat perenggan 10).

(2) Analisa terperinci tentang alasan-alasan penghakiman hakim perbicaraan menunjukkan hakim itu telah mengambil kira isu berhubung kerja-kerja pengubahan dan isu berhubung bon pelaksanaan itu. Perkara-perkara tersebut tidak pun dikendalikan atau dikemukakan oleh MR dalam alasan-alasan penghakimannya (lihat perenggan 12–14).

(3) Oleh kerana hakim perbicaraan telah meneliti semua keterangan lisan dan dokumentar dan telah memberikan sebab-sebab untuk penemuan beliau yang mana MR tidak mempunyai kedudukan untuk menyangkal, MR adalah salah untuk melaksanakan kuasa campur tangan rayuannya, lebih-lebih lagi dalam kes ini apabila MR didapati tidak pasti dalam alasan-alasan penghakimannya berhubung sama ada ia telah memerintahkan perbicaraan semula kes atau tidak. Adalah jelas, dalam menyemak semula keputusan Mahkamah Tinggi, MR tidak mengguna pakai prinsip campur tangan rayuan dengan betul (lihat perenggan 15).

(4) MR adalah salah kerana mengakas keputusan hakim perbicaraan kerana

tidak membenarkan pindaan kepada tuntutan balas itu. Hakim perbicaraan telah pun mengambil kira isu secara terperinci dan telah membuat keputusan betul dengan menolak pindaan itu. Beliau prihatin tentang hakikat yang pindaan itu telah dipohon lewat — dan juga tanpa permohonan rasmi tetapi telah ditimbulkan dalam penghujahan bertulis responden — selepas semua saksi-saksi dipanggil untuk memberi keterangan dan pihak-pihak menutup kes mereka. Keputusan beliau berhubung isu itu telah disokong sewajarnya oleh beberapa autoriti kes berhubung prinsip-prinsip tetap tenteng pindaan kepada pliding. Walaupun hakim perbicaraan terkhilaf kerana enggan menerima pindaan itu MR patut kemudian mempertimbangkan rayuan berdasarkan merit untuk manfaat pindaan itu tetapi tidak berbuat demikian (lihat perenggan 16–18).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Ketteman v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49, CA (refd)

Syarikat Ying Mui Sdn Bhd v Muthusamv a/l Sellapan and other appeals [1999] 6 MLJ 622, HC (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Appeal from: Civil Appeal No W-02–2155 of 2010 (Court of Appeal, Putrajaya)

Robert Lazar (Felix Dorairaj and Aarthi Jeyarajah with him) (Dorairaj Low & Teh) for the appellant.

Ramdas Tikamdas (N Devian with him) (Devan & Associates) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal in reversing the High Court decision in favour of the appellant. The appellant was the plaintiff and the respondent was the defendant in the consolidated actions in the High Court. We will refer to the parties as they were before the High Court.

[2] Leave to appeal was granted by this court on the following questions: **A**

(a) whether the test for appellate interference has been broadened to include the ground that the issues for trial have been stated in very broad and general grounds;

(b) whether it is right to set aside an order of the High Court after a full trial on these grounds without identifying the error, if any, that the trial judge is said to have committed in adjudicating on the issue; and **B**

(c) whether the test for allowing an amendment to the pleadings that is made after evidence has been fully adduced has been liberalised to allow the amendment for so long as an order for costs is sufficient to compensate, and if the Court of Appeal was to hold that the trial judge ought to have allowed the amendment, then whether the dispute ought not then be remitted to the High Court for a retrial. **C**

D

BACKGROUND FACTS

[3] The relevant background facts of the case may be summarised as follows: **E**

(a) by a letter of acceptance of tender dated 13 March 2001, the defendant was appointed as the contractor to design, build and complete the secondary school at Section 7, Shah Alam, Selangor Darul Ehsan ('the project') by the Ministry of Education ('MOE') as the employer;

(b) by a letter of award dated 28 March 2001, the defendant appointed the plaintiff as its subcontractor for the project on the terms and conditions contained therein for the sum of RM7,480,000 (the subcontract'). The details of the subcontract are as follows: **F**

(i) the contract was a fixed lump sum price contract; **G**

(ii) the site possession date was 27 March 2001;

(iii) the completion date was 12 months from the date of possession that is 26 March 2002;

(iv) the plaintiff shall produce a performance bond to the defendant. The same was procured from OCBC Bank for the sum of RM374,000; **H**

(v) defect liability period is 24 months from the date of completion of the subcontract works; **I**

(vi) the plaintiff will be imposed LAD at RM1,000 per day of delay for breach of the relevant works from completion beyond the schedule target dates;

(vii) progress claim will be paid within 14 days after receipt of payment from the client (MOE); and

(viii) the defendant shall be entitled to deduct from any set-off against any money due from him to the plaintiff which the plaintiff is liable to pay to the defendant which the plaintiff received prior notice in writing of the defendant's intention to set-off the amount quantified and the grounds upon which such set-off is claimed to be made;

(c) the subcontract had special conditions attached to it, inter alia:

(i) if within seven days upon receipt of the defendant's project manager's instructions in writing, the plaintiff does not comply physically to execute the works or is not in compliance to the instructions issued, the defendant may employ a third party or other persons to execute the works and any additional costs is recoverable from the plaintiff plus a management fee of 10%;

(ii) the plaintiff to notify the defendant (with the appropriate contract clauses) as for the cause of variation claims and any other contract provisions if so desired that the plaintiff deemed to be entitled, within 26 days of the events being incurred or thereupon the claim shall be treated null and void; and

(iii) the unit rates in the subcontract shall be deemed to be firm with no provision for price fluctuation throughout the subcontract period;

(d) the rates for the work in the subcontract were lower and different from the rates in the main contract;

(e) on 7 August 2003, the defendant issued a demand on the performance bond. OCBC Bank paid and the defendant received the sum of RM374,000 as performance bond on 14 August 2003;

(f) during the subsistence of the subcontract the defendant issued 11 payments certificates totaling RM6,887,691 for the period ending 18 April 2002. The defendant had paid the sum of RM6,887,691 under the subcontract;

(g) the claim in the High Court was brought by the plaintiff against the defendant and it comprised three main items as follows:

(i) the value of work done under the initial subcontract;

(ii) a claim for variation works which in turn can be subdivided into two parts:

(A) variation directed by the client (MOE); and

(B) that directed by the defendant;

(iii) a claim for the return of the sum paid on the performance bond pursuant to a demand made by the defendant;

(h) the defendant had a counterclaim against the plaintiff for alleged delay, cost of rectification and defective works.

PROCEEDINGS BEFORE THE HIGH COURT

[4] At the High Court the agreed issues for trial by the parties were as follows:

(a) what is the total value of work done by the plaintiff under the subcontract and consequently the amount due (if any) from the defendant to the plaintiff in respect of work done under the subcontract;

(b) what (if any) is the total amount the defendant is entitled under the terms of the subcontract to deduct or set-off from the total value of works done by the plaintiff under the subcontract;

(c) consequent to the forgoing was the defendant entitled to issue a demand on the performance bond and receive payment thereon in the sum of RM374,000; and

(d) is the plaintiff after taking account of (a) and (b) above entitled to a full refund of RM374,000 or part thereof inclusive of interest.

[5] After a full trial and after having heard the oral evidence and considered the documentary evidence, the learned trial judge of the High Court found in favour of the plaintiff and entered judgment for the plaintiff as follows:

(a) a sum of RM250,987.65 being the value of the work (excluding variations);

(b) a sum of RM238,506.76 being the value of variation orders as directed by the Ministry of Education (MOE); and

(c) a sum of RM264,275.20 being the value of variation orders that were non-MOE directed.

In addition, the learned judge of the High Court also gave judgment to the plaintiff in the sum of RM374,000 being the value of the performance bond that the defendant had made on demand and which had been paid.

PROCEEDINGS BEFORE THE COURT OF APPEAL

[6] The defendant appealed to the Court of Appeal and after hearing arguments on the 7 of March 2011, the Court of Appeal merely allowed the defendant's appeal and set aside the order of the High Court. When the Court

of Appeal pronounced its decision, there was no pronouncement by the Court of Appeal as to whether the matter was to be remitted to the High Court for a re-trial. Neither did the Court of Appeal make any pronouncement that the plaintiff's claim was to stand dismissed. There was also no pronouncement on the defendant's counterclaim.

[7] After the application for leave at the Federal Court had been filed, the plaintiff received a copy of the grounds of judgment of the Court of Appeal. The grounds of judgment disclosed that the Court of Appeal had in fact ordered a re-trial. In order to obtain the clarification of the Court of Appeal, and if necessary, to have the order amended, the plaintiff then proceeded to file a notice of motion with the Court of Appeal asking for a clarification. The notice of motion was heard by the same coram of the Court of Appeal on 27 April 2012. The learned judges of the Court of Appeal clarified that they had not ordered a re-trial but that only the order of the High Court was to be set aside. The Court of Appeal also stated that there was an error in the last para (26) of the grounds of judgment and that the error will be rectified.

DECISION OF THIS COURT

[8] We will first deal with questions no (a) and (b) posed before this court together as they relate to the issue of the test on appellate interference.

[9] On the clarification made by the Court of Appeal that they had not ordered a re-trial of the case and to that effect they had made an amendment to para (26) of the grounds of judgment, it is noted that there are other paragraphs in the said grounds of judgment which still suggest that the Court of Appeal was of the considered opinion that the dispute ought to be sent for a re-trial in the High Court. This is to be found particularly in paras (17) and (22) of the grounds of judgment of the Court of Appeal. This is therefore at odd with the clarification that the Court of Appeal made on 27 April 2012 as submitted by learned counsel for the plaintiff.

[10] We are of the view in the present case that even if the Court of Appeal had merely reviewed the proceedings in the High Court for the purposes of determining whether to send the matter for a re-trial, there is no room for appellate intervention. There is no cause for the Court of Appeal to have intervened to set aside the decision of the High Court in the circumstances of this case. The Court of Appeal can only do so in a case of this nature, if the learned trial judge was plainly wrong in coming to her decision. The case before the High Court was one that involved findings of facts. In such a case, it is our view that unless it was found that the learned trial judge was plainly wrong, it was not open for the Court of Appeal to have intervened even to the limited extent of ordering a re-trial.

[11] The crux of the dispute between the parties as contended by the defendant was on the plaintiff's claim for alleged variation works in the sum of RM701,940.06 pursuant to 22 variation orders. Learned counsel for the defendant submitted that the learned trial judge had relied on as a fact that based upon the defendant's letter dated 8 October 2002, the defendant had objected to only four items of the variation orders out of the detailed lists set out. The defendant contended before the Court of Appeal on this disputed issue that the learned trial judge was wrong in coming to the conclusion that based on the said letter dated 8 October 2002 objecting only to four items, the others were deemed admitted. The Court of Appeal agreed with the contention of the defendant and was of the view that the learned trial judge failed to address the question of proof of whether the variation works were authorised and if so of the value of work done.

[12] With respect to the above contention of the defendant on the issue of variation works, we are of the view there is no justification for appellate intervention by the Court of Appeal on the findings made by the learned trial judge. A closer analysis of the learned trial judge's grounds of judgment would show that the judge did consider the effect of cross-examination of DW1, the director of the defendant company on this issue of variation works and the correspondence between the parties in addition to the letter of the 8 October 2001.

[13] It is to be noted that in so far as the variation orders as directed by the Ministry of Education (MOE) were concerned, the learned trial judge dealt with it at paras 13–14 of her grounds of judgment and in fact took into account the evidence of PW2, an engineer employed as project manager by MOE for the implementation of the project. MOE was the client of the defendant in this case and the evidence of PW2 therefore would have been the most preferable as it was not self-serving.

[14] The learned trial judge also dealt with the various items of the counterclaim that were brought by the defendant and dealt with them at paras 17–21 of the grounds of judgment. This matter was not dealt with by the Court of Appeal at all in its grounds of judgment. As for the items of defective works, which the defendant had alleged, the learned trial judge dealt with them at paras 22–23. Again this was not dealt with by the Court of Appeal. On the issue of the performance bond, this was dealt with by the learned trial judge at paragraphs 26–27 of the grounds of judgment. Again this issue was not addressed by the Court of Appeal in its grounds of judgment.

[15] Having noted that the learned trial judge had gone through all evidence both oral and documentary and had given reasons to such findings which the Court of Appeal was not in a position to controvert, we are of the view that the

Court of Appeal was wrong in exercising its powers of appellate interference. More so in the present case when the Court of Appeal was found uncertain in its grounds of judgment for its decision whether to order a retrial of the case or not. Clearly the Court of Appeal in revising the decision of the High Court had not correctly applied the principle of appellate interference (see the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1).

[16] We will now deal with question no (c) posed before this court on the issue of amendment made at the trial after close of evidence given by both parties. The defendant applied to amend the counterclaim after both sides had closed their respective case. There was no formal or written application made by counsel for the defendant. The application was contained in the written submission of the defendant after trial. The learned trial judge rejected the application to amend and gave reasons for her rejection. The Court of Appeal in their judgment stated that they would allow the amendment and gave their reasons, inter alia:

> But objection on the ground of delay alone is insufficient. It is to ensure that bona fide issues are dealt with and a fair and just decision is delivered at the end of a case. For that reason, the authority (sic) favour allowing the application so long as if any injustice caused thereby can be compensated with an order of costs. The grounds of decision and the notes of proceedings show that the question was not fully considered in depth.

[17] With respect to the Court of Appeal's reasoning in allowing the amendment, we are of the view the learned trial judge in fact did go into this matter in sufficient depth and delivered the correct decision in so far as the amendments were concerned. The learned trial judge was mindful of the fact that this was an amendment that was made late in the day after the witnesses have been called to give evidence and tested by cross-examination and the parties had closed their case. The learned trial judge had correctly supported her decision by citing a number of case authorities on settled principles of application for amendment of pleadings as follows:

(a) *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213;

(b) *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38;

(c) *Syarikat Ying Mui Sdn Bhd v Muthusamv a/l Sellapan and other appeals* [1999] 6 MLJ 622; and

(d) *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49.

[18] In the circumstances of this case it is our judgment that the Court of Appeal was wrong in reversing the decision of the learned trial judge on the issue of amendment. Even if the learned trial judge was wrong in refusing the

amendment, the Court of Appeal ought then to have proceeded to consider the appeal on its merits with the benefit of the amendment. This the Court of Appeal did not do. The learned trial judge in our view in any event was correct in so far as the merits of the case were concerned in refusing the defendant's application for amendment.

CONCLUSION

[19] For the reasons abovestated we would allow the plaintiff's appeal with costs. The order of the Court of Appeal is hereby set aside and consequently the order of the High Court is restored.

Appeal allowed with costs.

Reported by Ashok Kumar